AHMAD BIN HAJI ABDUL MAJID

v.

LEE YAT CHEONG & ORS.

HIGH COURT MALAYA, IPOH
TUAN CHIN FOOK YEN JC
[CIVIL SUIT NO. 25-279-87]
29 JULY 1995

TORT: *Negligence - Accident between motorcycle and lorry - Encroachment by lorry - Defences of mechanical defect, inevitable accident and contributory negligence - Whether there had been failure to properly maintain the lorry - Whether defences proved - Personal injury - Compound fracture dislocation of right wrist and elbow - Disabilities - Quantum of damages.*

This was a claim for damages for personal injury sustained by the plaintiff when a lorry encroached into his lane and collided into his motorcycle.

The plaintiff was riding his motorcycle from Gopeng to Tapah on his correct side when he spotted a motorcar waiting to turn into the junction to Chenderiang. Suddenly a lorry driven by the 1st defendant from Kuala Lumpur overtook a car on the right and encroached onto his lane. He tried to swerve but was unsuccessful and upon collision lost consciousness. On the contrary, the 1st defendant testified that he was driving from Bidor to Ipoh and was following a lorry which had a motorcar in front of it. The defendant claimed that the lorry applied the emergency brake as the motorcar in front of it wanted to turn to kampung Chenderiang. He admitted that when he applied the brake his lorry swerved to the right and encroached about 1 foot onto the right lane but stated that at the time of the accident the hydraulic pump of the steering was damaged.

The plaintiff was 40 years old at the time of the accident and earned about RM1,000 to RM1,200 per month travelling from place to place selling cloth for a living. As a result of the accident the plaintiff sustained a compound fracture dislocation of the right wrist and right elbow and severance of tendon and nerve in front of the wrist. The medical specialist opined that the right forearm and hand was so disabled that it was functionless.

The defendant raised defences of mechanical defect, inevitable accident and contributory negligence.

Held:

[1] The defendant had not produced any record of service, inspection and maintenance and the Court is not satisfied with the bare assertions by the defendant concerning the mechanical defect and his assertion that he had inspected the lorry and had not seen any damage. Such assertions were an afterthought as it was not reported to the police, not instructed to his solicitors and the lorry was not inspected by the RIMV.

[2] It is more probable that the defendant was not driving with due care and attention to other vehicles on the road until it was too late, as happened in this case. When the lorry in front of him suddenly pulled to a stop, he had no alternative but to swerve to his right to avoid colliding into the rear of the said lorry. Having done that he could not avoid the plaintiff. As the collision was caused by the negligence of the defendant and not as a result of something he could not avoid, the defence of inevitable accident must also fail.

[3] It is noted that the fragments of broken glass on the road were on the plaintiff's correct side which the Court is convinced is the point of impact. Further, the plaintiff was probably hit on the right handle of the motorcycle as the plaintiff's right hand was injured. Accordingly, the Court finds that the defendant had encroached onto the plaintiff's correct side of the road and collided into him. There was nothing that the plaintiff could have done to avoid the accident with or without the bundle of cloth he was carrying on his motorcycle. Thus the claim of contributory negligence fails.

[4] As the injury was essentially to the right hand, the plaintiff can still sell cloth but he would be impeded in so far as travelling is concerned as he is unable to grip the motorcycle handle, but he could hire a taxi as a replacement. As such a sum of RM400 per month for taxi fare is a reasonable figure.

[5] The Court awards general damages of RM35,000 for pain and suffering and loss of amenities and special damages comprised of pre-trial full loss and partial loss and post trial loss with interest and costs to the plaintiff.

[Plaintiff's claim allowed with costs].

Cases referred to:
Ten Chye Choo & Ors. v. Chong Kew Mooi [1970] 1 MLJ ***(refd)***
Merchant Prince [1892] 179 ***(refd)***
Browne v. De Luxe Car Services [1941] 1 KB 549 ***(refd)***
Foong Nan v. Sagadevan [1971] 2 MLJ 26 ***(refd)***
Jamaliah bte Mohamed (infant) v. Ng Fook Seng [1982] 2 MLJ x/viii ***(refd)***

For the plaintiff - M/s. Bachan & Kartar
For the defendant - M/s. Gibb & Co.

JUDGMENT

Chin Fook Yen JC:

On 8 January 1983 an accident took place between a motor cycle ridden by the plaintiff and a motor lorry owned by the 1st defendant and driven by the 2nd defendant.

According to the plaintiff, he was riding his motor cycle from Gopeng to Tapah, at the material time about 3-4 feet from the grass-verge on his correct side at 25 k.p.h. He "nampak sebuah kereta di simpang (ke Chenderiang) menunggu untuk belok masuk simpang. Tiba-tiba (defendant's motor-lorry) datang dari Kuala Lumpur memotong kereta di bahagian kanan". He said he tried to swerve but in vain. He lost consciousness, on impact. When he regained consciousness he found himself at Ipoh General Hospital.

The defendant testified that he started his journey from Bidor to Ipoh. At the material time he followed a motor lorry and in front of it, was another motor car. According to the defendant, the motor lorry in front of him "berhenti secara kecemasan kerana kereta di hadapan lori itu akan membelok ke kampong Chenderiang". He admitted that when he applied the brake, the motor lorry swerved to the right and "ada makan jalan lebih kurang 1 kaki dari tengah jalan. Pada masa itu dapat kemalangan." Under cross-examination he explained that at the time of accident "hydraulic pump untuk steering rosak." At the close of his defence case, the Court allowed the defendant to include the defence of mechanical defect. In his written submission, Counsel for the defendant relied on:

1. as defence, mechanical defect;
2. as defence, inevitable accident and
3. contributory negligence by the plaintiff.

In the case of *Ten Chye Choo & Ors. v. Chong Kew Mooi* [1970] 1 MLJ a Privy Council case, the learned trial Judge accepted that the taxi went over to its wrong side of the road and as a result the collision occurred. The reason why the taxi veered across the road was that a fracture occurred of the connection between the steering mechanism and the nearside front wheel. Needless to say when that happened the taxi became out of control. The taxi was absolved from blame, not because of the mechanical defect *per se* but rather because there was ample evidence to satisfy the Judge that there had been no failure properly to maintain and inspect the taxi, such as having had the taxi examined by the Registrar of Motor Vehicles and certified to have been in a satisfactory condition.

In the instant case, I am obliged to ask a few observations such as whether there had been a failure properly to maintain the motor lorry. Had the defendant had some warning which he wrongly failed to heed that the motor lorry was not in a satisfactory condition? The more important issue relates to matters of inspection and maintenance. In this respect the defendant had not produced any record of service, inspection and maintenance. I am not satisfied with the bare assertions by the defendant that "pada masa (kemalangan) hydraulic pump untuk steering rosak." and that on that day he "ada periksa motor lorry dan tidak nampak kerosakan." I agree with the Counsel for the plaintiff that such assertions were an after thought, as it was not reported to the Police, not instructed to his solicitors and the motor lorry was not inspected by the RIMV.

With only such evidence as adduced, the defendant had failed to satisfy the defence of mechanical defect.

As regards the defence of inevitable accident, I would like to refer to the case of the *Merchant Prince* [1892] pp. 179, 190, 189, 187 in which Fry, LJ said at page 189:

> The burden rests on the defendants to shew inevitable accident. To sustain that, the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, It does not appear to me that they have shewn inevitable accident.

and Lord Esher M.R. put it more succinctly at page 178 as follows:

> He can only get rid of that proof against him by showing inevitable accident, that is, by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid.

In the present case what the defendant said was that he "mengikuti sebuah kereta dan sebuah lori. Di hadapan saya adalah sebuah lori. Lori yang saya mengikuti berhenti secara kecemasan. Kerana kereta di hadapan lori itu akan membelok ke kampung Chenderiang. Saya tidak nampak kereta ada atau tidak beri isyarat. Saya tekan brek dan lori "swerved" ke kanan ada makan jalan lebih kurang 1 kaki dari tengah jalan. Pada masa itu dapat kemalangan."

His reason for having crossed the centre white line was due to the defect of the hydraulic pump of the steering. I am not inclined to accept this bare assertion for reason aforesaid. It is a more probable version that the defendant was not driving with due care and attention to other vehicles on the road until it was too late, as had happened in this case. When the motor lorry in front of him suddenly pulled to a stop, he had no alternative but to swerve, to his right as he did to avoid colliding into the rear of the said motor lorry. Having done that, he could not avoid the plaintiff.

In the case of *Browne v. De Luxe Car Services* [1941] 1 KB 549, 552 Sir Wilfred Greene M.R. said:

> ... I do not find myself assisted by considering the meaning of the phrase 'inevitable accident'. I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence?

The cause of the collision was a cause produced by the negligence aforesaid on the part of the defendant and not a cause the result of which he could not have avoided. The defence of inevitable accident must also fail.

Since defence has pleaded contributing negligence, it is relevant to ask what is in law the meaning of contributing negligence?

The Chief Justice, Malaya H.T. Ong said in *Foong Nan v. Sagadevan* [1971] 2 MLJ at p. 26:

> Contributing negligence means the failure by a person to use reasonable care for the safety of himself, contributing, by his want of care, to his own injury.

I cannot help but note the fragments of broken glass on the road (see the photograph in the agreed bundle of documents) and the sketch-plan, P2. It is not disputed that they were on the plaintiff's correct side, - some 3-4 feet from the grass-verge as the plaintiff testified under cross-examination, - of the road. I am convinced that the point of impact in relation to the road was where the broken glasses were found. After the plaintiff was hit more probably on the right handle of the motor cycle, as the plaintiff's right hand was injured, he lost control; his motor cycle fell causing the scratch-marks on the road (again his correct side). On the facts aforesaid. I find that the defendant had encroached to the plaintiff's correct side of the road and collided into him. There was no reason for the defendant to be on the side of the road but for his own folly.

On the other hand there was nothing that the plaintiff could have done to avoid the said accident with or without the bundles of cloth that he was found carrying on his motor cycle. I also find that the claim of contributing negligence fails.

Now I shall deal with the issue of quantum.

General Damages.

Dr. M. Ponnusamy of Hospital Besar Ipoh noted that the plaintiff to have sustained on admission on 8 January 1983 the following injuries:

> He had abrasion wounds over the forehead and (R) arm. Small lacerations over (R) forearm and an extensive laceration with cut flexor tendons over the (R) wrist. The Radius/Ulna were broken with dislocation of the wrist joint.

On 20 December 1985, Dr. R. Balakrishnan, a Consultant Orthopaedic Surgeon found, seriously the injury to the plaintiff was confined to the right upper limb. Movements were as follows:

	Right	**Left** (Uninjured) For comparison
Shoulders	Full	Full
Elbow Flexion	5^0 - 90^0	0^0 - 140^0
Forearm Pronation	0^0	90^0
Supination	0^0	90^0

> The wrist was fixed at some 20^0 of palmarflexion, from which position no movement was possible either actively or passively. In the fingers, no active movements were possible but passively it was possible to move them through half the range.
>
> He was not able to form a grip.

He concluded his opinion as follows:

> Encik Ahmad sustained compound fracture dislocation of right wrist and fracture dislocation of right elbow. There was also severance of tendon and nerve in front of the wrist. The right forearm and hand are so disabled that it is functionless. He will not be able to use the hand for any work, except to support, virtually as a stump could be used to support some article.

Counsel for the plaintiff urged the Court to award the plaintiff the sum of RM50,000 for pain and suffering and loss of amenities. In support, *Jamaliah bte Mohamed (infant) v. Ng Fook Seng* [1982] 2 MLJ x/viii was cited, where an award of RM40,000 was made for a severe crush injury to the plaintiff's right hand, a case more serious than the instant case.

On the other hand, Counsel for the defendant cited *Davendran's* case - reported at Das Vol. 3 at page 70 where an amputation was needed. The sum of RM35,000 was awarded for pain and suffering and loss of amenities. In *Davendran's* case the extent and nature of the injuries have a great deal of similarity. I therefore, award RM35,000 being a fair and reasonable compensation to the plaintiff for pain and suffering and loss of amenities.

Special Damages

(i) Special damages under (a), (b) and (d) agreed at RM521.

(ii) Plaintiff with the use of his motor cycle travelled from place to place to sell cloth for a living. He was 40 years old at the time of the accident on 8 January 1983, earning RM1,000 to RM1,200 per month to up keep a family of 4 members in all. He said he paid RM70 per month for rental, RM500 per month house-hold expenses; and about RM230, per month for instalment payments for his motor cycle; mesin basuh, mesin jahit dan peti ais. At the end of the month, he still could save up RM100.

I am not surprised the plaintiff could make a profit of RM1,000 per month and I so find.

(a) Pre-trial full loss.

Counsel for the defendant suggested 1 year full loss of earnings which I feel reasonable. I therefore award the plaintiff, pre-trial full loss of earnings for 12 months at (l,000 x l2) RM12,000.

As the injury was essentially to the right hand, he could still sell cloth if he had wanted so. His capacity to work as cloth merchant would be impeded in so far as travelling from place to place was concerned. He could hire a taxi to replace his motor cycle, as he was not able to grip the handle. I feel a sum of RM400 per month is reasonable figure for taxi fare to carry him and merchandise to and fro, his house and his market

(b) For pre-trial partial loss of earnings I award (January 1984 to July 1995 - 400 x 127) RM50,800.00.

(c) Post-trial loss

Counsel for plaintiff submitted that plaintiff could easily work until 60 years old. I agree. This will give him 8 years working life (60 - 52). I set off one-third taking into account one lump sum advance payment and contingencies. I allow a multiplier of 5, to arrive at an award of RM20,780 with no interest.

In the assessment of damages, in so far as the multiplicand is concerned, I have also taken into account the uncertainty of a steady income.

I find judgment for the plaintiff as follows:

1. General damages	RM35,000.00
2. Special damages	
(1) Disbursement agreed at	RM 521.00
(2) Pre-trial full loss	RM12,000.00
(3) Pre-trial partial loss	RM50,800.00
(4) Post-trial loss	RM20,780.00

Interest at 6% p.a. on general damages from date of service of writ to date of judgment, at 3% p.a. on special damages from date of accident to date of judgment except post-trial loss which will not carry interest; thereafter at 8% p.a. on judgment debt till payment.

Cost to plaintiff.